Filed 4/26/10 Zakarian v. Fidelity & Guaranty Life Ins. Co. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ANAID ZAKARIAN, Plaintiff and Appellant, v. FIDELITY & GUARANTY LIFE INSURANCE COMPANY, Defendant and Respondent.	B214030 (Los Angeles County Super. Ct. No. BC375736)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jane L. Johnson, Judge. Affirmed.

Law Office of John J. Perlstein and John J. Perlstein for Plaintiff and Appellant.

Reed Smith, Henry C. Wang, Zareh A. Jaltorossian, and Raymond Y. Kim for Defendant and Respondent.

In this third party action for breach of insurance contract, the trial court granted summary judgment for defendant Fidelity & Guaranty Life Insurance Company.[1] Plaintiff Anaid Zakarian, the sole beneficiary under her father's life insurance policy, has appealed, contending there are triable issues of material fact. We reject plaintiff's contentions and affirm.

BACKGROUND

When the insured, Beniamian Malian, died on April 24, 2007, his $25,000 whole life insurance policy had lapsed for nonpayment of premiums. The lapse occurred due to a January 2006 computer error, which had halted the automatic deduction of monthly policy payments from plaintiff's bank account.

As indicated in the chronology set forth in the margin,[2] defendant repeatedly requested timely payment of the past due premiums in order to reinstate the policy, and

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[1] Defendant Fidelity & Guaranty Life Insurance Company is now known as OM Financial Life Insurance Company.

[2] The computer error that triggered a stop to the automatic payments occurred, as stated above, in January 2006. In April 2006, defendant notified the insured that the policy had lapsed, but would be reinstated without an application for reinstatement, upon payment of $913 by May 3, 2006. After defendant did not receive payment by that date, it closed the file for the policy and marked it as lapsed. Plaintiff admitted in her deposition that she received the letter on or about April 3 and discussed the matter with the insured's insurance agent, Avetik Vardanyan.

In October 2006, Vardanyan called defendant and learned that the policy had lapsed and that reinstatement would require payment of $1,794.90 by October 28, 2006 (or $1,974.39 after that date), and an application for reinstatement.

In November 2006, defendant received payment of $1,972.32 and an application for reinstatement. Defendant informed the insured that the policy was being considered for reinstatement and that an additional $584.01 was required by December 28, 2006, to resume the automatic withdrawals.

The parties disagree as to what happened next. According to defendant, the $584.01 payment was not received by December 28, 2006. According to plaintiff, the

(Fn. continued.)

also requested that the insured submit a reinstatement application. Although the reinstatement application was submitted, the required past due payments were not made in a timely manner. The reinstatement application was still pending when the insured died in April 2007.

In early May 2007, plaintiff submitted a claim for death benefits. Defendant denied the claim on the ground that the policy was not in effect on the date of death.

The policy provides in relevant part that: (1) the effective date of reinstatement is the date that the application for reinstatement is approved; and (2) in order for death benefits to be paid, the policy must be in effect on the date of death. Based on these provisions, defendant concluded that because the reinstatement application was still pending on the date of death, the policy was not in effect on that date.

In August 2007, plaintiff filed the present lawsuit for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, intentional infliction of emotional distress, and declaratory relief.

In November 2007, defendant advised plaintiff that: "Notwithstanding the fact that the Policy was lapsed when [plaintiff] submitted her claim and as a good-faith gesture in dealing with [plaintiff's] claim, [Fidelity & Guaranty] Life has decided to make an exception in this case to reinstate the Policy and pay the benefits under the Policy, as well as the reasonable legal fees and costs that [plaintiff] has incurred to date as a result of this matter." In December 2007, defendant paid plaintiff the full $25,000

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payment was mailed on December 19, 2006, and received, according to defendant's own records, on January 11, 2007.

In February 2007, defendant informed the insured that an additional payment of $949.21 was required within 30 days or his request to reinstate the policy would be closed as incomplete. Defendant conceded at oral argument that the notice was not sent to plaintiff's current address. As a result, this payment was not received.

In March 2007, defendant issued a refund of $1,972.32 and closed the application for reinstatement file. Plaintiff denies receiving the refund check, which was never cashed.

On April 24, 2007, the insured died.

policy benefits (plus $534.25 in interest), without prejudice to her "right to continue with this lawsuit and pursue her claims for relief for extracontractual damages."

In April 2008, defendant moved for summary judgment of the complaint. The motion was based on the following facts: (1) the suspension of the automatic premium payments was caused by the computer error of defendant's third party administrator; (2) when defendant denied plaintiff's claim in May 2007, there was no evidence that defendant's officers, directors, or managing agents were aware of, or had approved or ratified the January 2006 computer error; (3) upon discovering the computer error, defendant paid the claim in full notwithstanding the insured's delay in paying the premiums required to reinstate the policy; and (4) even if defendant is held liable for its third party administrator's computer error, it did not engage in any outrageous, bad faith, malicious, or oppressive conduct.

Defendant sought summary judgment based on the following reasons. The breach of contract claim must fail because the insured did not make the requisite premium payments and plaintiff received the full policy benefits. The breach of implied covenant claim must fail because defendant did not breach the policy terms and acted reasonably in denying plaintiff's claim. The intentional infliction of emotional distress claim must fail because defendant did not act outrageously in handling plaintiff's claim. The declaratory relief claim must fail because plaintiff has an alternative remedy at law. The punitive damages claim must fail because there is no evidence of malice, oppression, or fraud.

The trial court granted the motion for summary judgment and entered judgment for defendant. Plaintiff then filed this timely appeal.

DISCUSSION

I. Standard of Review

The standard of review for summary judgment is well established. The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

(Code Civ. Proc., § 437c, subd. (c).) A moving defendant has met his burden of showing that a cause of action has no merit by establishing that one or more elements of a cause of action cannot be established or that there is a complete defense. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 849-850; *Lackner v. North* (2006) 135 Cal.App.4th 1188, 1196.)

We independently review an order granting summary judgment, viewing the evidence in the light most favorable to the nonmoving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; *Lackner v. North*, *supra*, 135 Cal.App.4th at p. 1196.) In performing our independent review of the evidence, "we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue." (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.)

In determining whether there are triable issues of material fact, we consider all the evidence set forth by the parties, except that to which objections have been made and properly sustained. (Code Civ. Proc., § 437c, subd. (c); *Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 334.) We accept as true the facts supported by plaintiff's evidence and the reasonable inferences therefrom (*Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 148), resolving evidentiary doubts or ambiguities in plaintiff's favor (*Saelzler v. Advanced Group 400*, *supra*, 25 Cal.4th at p. 768).

II. Breach of Contract

According to the trial court's order, it concluded that the breach of contract claim must fail for two independent reasons. First, the policy was not in effect on the date of death. Given that the computer error did not excuse the insured's obligation to pay premiums, plaintiff was obligated to comply with defendant's subsequent demands for payment. However, the insured's payments were always late and the policy was not

reinstated before the date of death. Second, plaintiff did not suffer any contract damages because the policy benefits were paid in full.

On appeal, plaintiff challenges only the second half of the trial court's ruling. Plaintiff contends that summary judgment was improper because defendant unreasonably delayed payment of the policy benefits, citing *Delgado v. Heritage Life Ins. Co.* (1984) 157 Cal.App.3d 262, 278 (evidence of insurer's conscious disregard of insured's rights was sufficient to submit the issue of punitive damages to the jury). However, in light of the trial court's alternative ruling that the policy was not in effect on the date of death, the payment of policy benefits could not have been untimely because no payment was required under the policy. Accordingly, plaintiff's reliance on the *Delgado* decision is misplaced. Because plaintiff does not challenge the trial court's determination that the policy was not in effect on the date of death, we need not discuss that aspect of the ruling.

III. Breach of the Implied Covenant

As a general rule, the delay or failure to pay insurance benefits, standing alone, does not support a claim for breach of the implied covenant. In order for an insurer to be found liable for the bad faith delay or denial in the payment of policy benefits, the insurer must have acted unreasonably or without proper cause. (*Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 347.) "[W]here there is a *genuine issue* as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad faith liability imposed on the insurer for advancing its side of that dispute. . . . In other words, an insurer *is* entitled to give its own interests consideration when evaluating the merits of an insured's claim. [Citation.] [¶] "It is now settled law in California that an insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured's coverage claim is not liable in bad faith even though it might be liable for breach of contract. [Citation.]" (*Ibid.*)

In this case, given the policy lapse due to the nonpayment of premiums, there was a genuine dispute regarding the existence of coverage. Although plaintiff argues that

defendant's failure to perform any investigation before denying her claim was unreasonable, the record is clear that an investigation would not have assisted her cause. Had defendant performed an investigation, it would have learned about the computer error, but the following facts would still remain: (1) the insured owed policy payments notwithstanding the computer error; (2) the policy payments made after discovery of the computer error were untimely; (3) the policy was *not* reinstated before the date of death; and (4) the policy was *not* in effect on the date of death. Accordingly, plaintiff's contention that defendant is liable for the bad faith delay in the payment of policy benefits must fail as a matter of law. (See *Stewart v. Life Ins. Co. of North America* (E.D.Cal. 2005) 388 F.Supp.2d 1138 [insurer's denial of benefits was not unreasonable in light of the good faith coverage dispute].)

IV. Intentional Infliction of Emotional Distress

Citing *Coleman v. Republic Indemnity Ins. Co.* (2005) 132 Cal.App.4th 403, 417, the trial court held that the denial of benefits under a policy does not, by itself, give rise to a claim of intentional infliction of emotional distress. "Liability for intentional infliction of emotional distress extends 'only to conduct so extreme and outrageous "as to go beyond all possible bonds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."' (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 499, fn. 5.)" (*Coleman v. Republic Indemnity Ins. Co.*, *supra*, at p. 416.)

In this case, the record does not support a finding of extreme and outrageous conduct. Given that plaintiff does not dispute the trial court's finding that the policy had lapsed before the date of death, it was not unreasonable for defendant to deny plaintiff's claim. Accordingly, the claim for intentional infliction of emotional distress must fail as a matter of law.

V. Punitive Damages

After granting summary adjudication of the claims for breach of the implied covenant and intentional infliction of emotional distress, the trial court concluded that the

prayer for punitive damages must necessarily fail. For the reasons set forth in the discussion above, we agree.

VI. Breach of Fiduciary Duty

The complaint alleged a claim for breach of fiduciary duty that was not specifically addressed in the summary judgment motion. Plaintiff contends on appeal that the summary judgment must be reversed because the motion did not address the claim for breach of fiduciary duty.

We conclude that the claim for breach of fiduciary duty did not survive the summary judgment motion. The cause of action is based on the allegation that the insurance claim was wrongfully denied. As we previously discussed, the record fails to support such a finding. In light of our determination that no triable issues of material fact exist as to the claims for breach of contract, breach of the implied covenant, and intentional infliction of emotional distress, it necessarily follows that no triable issues exist as to the claim for breach of fiduciary duty.

DISPOSITION

The summary judgment for defendant is affirmed. Defendant is awarded its costs on appeal.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P.J. MANELLA, J.